Tax Representation

ICAEW TAX FACULTY

TAXREP 43/08

Finance Bill 2008: Committee Stage Briefing on Schedule 37 onwards

Parliamentary Briefing submitted by the ICAEW on 4 June 2008 setting out our concerns and suggested amendments to: the proposed changes to the rules for record-keeping (clause 110 and Schedule 37); time limits for assessments and claims (clause 113 and Schedule 39); amendments to the FA 2007 penalties for errors rules (clause 117 and Schedule 40); penalties for failure to notify (clause 118 and Schedule 41); seizure of goods (clauses 122 to 124 and Schedules 42 and 43); set-off of tax debts (clauses 125 and 126); and the certificates of debt rules (clause 132 and Schedule 44).

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1. Clause 110 and Schedule 37, Record-keeping

General comments

The Schedule seeks to align existing record-keeping requirements for the various taxes and also arises out of the Powers review of compliance checks. The Schedule amends the existing record-keeping requirements set out in s 12B, Taxes Management Act (TMA) 1970 and the corresponding rules for corporation tax (Sch 18 to FA 1998) and VAT (Sch 11 to VATA 1994).

The key change is that the amended provisions give HMRC the power to specify by way of regulations what records should be kept and preserved. For these purposes, the records extend to include supporting documents such as vouchers and receipts. Further, the regulations may make further reference to items specified in any notice published by HMRC.

As far as we are aware the current requirements in s 12B, TMA 1970 (and the corresponding provisions for corporation tax found in para 21 of Sch 18, FA 1998) which require a taxpayer to keep the records needed to make a correct and complete return, are readily understood and we believe constitute a reasonable generic statutory requirement. We are therefore concerned about a blanket power given to HMRC to prescribe what records should be kept.

We would be grateful for clarification as to what secondary legislation is proposed. We would expect that any such provisions would not seek to expand generally on the generic requirement but will be limited to additional record-keeping requirements in specific high risk-areas, for example in combating MTIC fraud.

We understand that record-keeping requirements will be set out not just in legislation but also in HMRC guidance. We think this is wrong in principle: it is unreasonable for a taxpayer to also have to refer to any HMRC guidance in case it might contain statutory requirements somewhere among the guidance. Further, if guidance is intermingled with statutory requirements, taxpayers are unlikely to know where the guidance ends and the obligations begin.

The concept of materiality should be applied in determining the degree of detail in which records should be kept for tax purposes.

Detailed comments on Schedule 37

Para 2(4)

We believe that this provision is too wide. The power to make regulations should be limited to those under specific provisions imposed by Parliament, such as paras 2(3A) and (3B) of Sch 11, VATA 1994 which Parliament decided should require enhanced record keeping requirements in limited circumstances to seek to combat MTIC fraud. This is a recurring theme throughout this Schedule.

Proposed amendment:

Page 376:

Line 30, after "regulations" insert "made under para 2(3A) and (3B) of Sch 11, VAT Act 1994 or such other specific provisions as parliament may from time to time determine".

Para 2(7)
We believe it wrong in principle to impose obligations on taxpayers by way of tertiary legislation. A taxpayer is expected to know the law but is also entitled to know where they stand under the law. We think it unreasonable to expect someone to read many pages of HMRC guidance booklets in case there is a statutory obligation hidden somewhere amongst them.

Proposed amendment:

Page 377:

Line 9, leave out "and" and lines 10 –13.

Para 3(3)
The paragraph seems to give HMRC a wide ranging power to create statutory conditions by means of, for example, a press release of which it is unlikely most taxpayers will be aware. We believe that this provision should be limited to conditions specified in writing in relation to an individual taxpayer.

Proposed amendment:

Page 377:

Line 31, after "writing" insert "in relation to a particular taxpayer".

2. Clause 113 and Schedule 39, Time limits for assessments, claims etc

General comments
We recognise that the proposals to standardise time limits has been subject to consultation, but we are concerned about the absence of reasonable transitional provisions. For example, the current time limit for error or mistake provisions are five years and ten months for income tax (s 33 TMA 1970) and six years for companies (para 51 of Sch 18 FA 1998). These will be reduced to four years but there are no proposals for transitional arrangements.

It is unreasonable that a person who believes that he has 5 years 10 months to make an existing claim and decides not to do so until the end of that period because he cannot foresee whether his circumstances may change may now find himself time-barred. Indeed it appears that circumstances can arise where a person might be required to make a claim for 2009/10 before he is required to make a corresponding claim for 2008/09. This is a particular issue where claims may be made under these provisions as a result of EU law developments.

EU law is clear that legitimate expectations ought to be preserved and that a transitional period is required. We therefore think that the clause 113 should be amended to require the Treasury to bring the Schedule into effect only in relation to claims in respect of fiscal years after that specified by the order. As we assume that the intention is to bring the Schedule into effect from 6 April 2009, we suggest that the new time limits apply only in respect of periods beginning after 5 April 2009.

Proposed amendment:

Page 70:

Line 25, leave out “may”.

Line 25, insert after “provision” “under which the amendments can take effect only in relation to claims and assessments for a fiscal year starting after the date in which the order is made”.

Detailed comments on Schedule 39

Para 9(2)
We think it unreasonable for the new para (1A)(b) in conjunction with (1B) to extend the period for assessing from 4 to 20 years where a loss of tax is brought about by an agent or other third party, unless the taxpayer is himself complicit in the action.

Proposed amendment:

Page 384:

Line 30, after “person” insert “acting personally and not through an agent”.

Para 15
New s 118(6) TMA 1970 should apply only where the information is discovered at a time when HMRC are in time to assess the undercharge. It is unreasonable that a person who discovers a 10-year old mistake should be required to shoulder the burden of telling HMRC, knowing that HMRC can do nothing with the information, but that if he decides that it is pointless to do so HMRC become entitled to assess the item back 20 years.

Proposed amendment:

Page 385:

Line 38, after “later” insert “during the period within which it is possible for an assessment to be raised to recover the tax lost”.

3. Clause 117 and Schedule 40, Penalties for errors

General comments
These provisions also arise out of the Powers review. The Schedule extends the new penalty provisions that were introduced in Schedule 24 of the FA 2007 for the purposes of income tax, corporation tax, CGT and VAT to a further range of taxes, duties and levies, including inheritance tax, stamp duty land tax, stamp duty, petroleum revenue tax, insurance premium tax and a wide range of duties.

We are disappointed that the penalty provisions are being extended in this way when the FA 2007 measures have only recently come into force. The FA 2007 penalty provisions are far-reaching and we think it is right that these provisions should be introduced and bedded down before consideration is given to extending them further. We think it is wrong in principle to extend provisions that have only just been introduced and where there is as yet no evidence that they will work or encourage good compliance.

Further, while we favour alignment where this can be sensibly done, we do not agree with alignment for the sake of alignment, particularly if it gives rise to other problems. We are not convinced that penalties based on underlying behaviour and which also differentiate between prompted and unprompted disclosure are appropriate for one-off taxes such as inheritance tax and stamp duties.

In relation to inheritance tax, we think that they are inappropriate for personal representatives who are often unpaid laymen and who may have to try to piece together historical information from inadequate records which the deceased had responsibility for creating. In such circumstances the penalty will not necessarily reflect the behaviour of the personal representatives – and may not even reflect that of the deceased, as records might exist of which the personal representatives are unaware.

Detailed comments
In clause 117(3), it will be very confusing to taxpayers if new obligations are imposed on them piecemeal. The whole Schedule ought to be brought into effect on a single date.

Proposed amendment:

Page 73:

Line 10, leave out "and" on line 10 and lines 11 and 12.

In clause 117(4), we think that an order should require a positive resolution of Parliament. The provisions can fundamentally affect the penalties for which a person is liable and it should be for Parliament, not HM Treasury, to deprive a citizen of his possessions. Likewise, in clause 117(8), it should be for Parliament, not for HM Treasury, to decide what transitional provisions are appropriate.

Proposed amendment:

Page 73

Line 24, leave out lines 24-26 and insert "No regulations may be made under subsection (4) unless a draft of the statutory instrument containing them has been laid before, and approved by, a resolution of the House of Commons".

In para 3 of Schedule 40, new paragraph 1A(1)(c) should only apply where the inaccuracy was attributable to T 'knowingly' supplying false information. This appears to be what was envisaged by HMRC, as the explanatory notes refer to the information being 'deliberately' supplied.

Proposed amendment:

Page 393:

Line 17, after "T" insert "knowingly".

In relation to the disclosure of VAT errors, we are concerned about the amendments to the FA 2007 provisions in para 9 of Schedule 40. Whilst we welcome as a significant deregulatory measure the Government's decision to increase the VAT de minimis limit for mandatory disclosure of VAT errors under Regulation 34(3) of the VAT Regulations 1995 from £2,000 to £10,000, we believe that these revised penalty rules will deter most taxpayers from taking advantage of this deregulation.

The 2006 KPMG report "Administrative Burdens: HMRC Measurement Project", which was designed to identify tax and administrative burdens on businesses highlighted that the then VAT voluntary disclosure arrangements were viewed by business as an irritant because the relatively low net limit under which errors could be adjusted in A VAT return. Following discussion with the Administrative Burdens Advisory Board, the government increased the de minimis limit in the last Budget to the greater of £10,000 or 1% of turnover subject to an upper limit of £50,000. The government's response to the first 2007 Consultation published on 12 March 2008 in announcing the increase in the de minimis limit stated "The government consider that dealing with errors in this way strikes the right balance between business facilitation and the need to monitor compliance. The Consultation document indicated that a £10,000 limit would remove from virtually all small business the need to make a separate disclosure of VAT errors.

Unfortunately paragraph 9 of Schedule 24, FA 2007 largely negates this welcome deregulatory provision. Paragraph 9 grants reductions in penalties for disclosure of an under assessment subject to the taxpayer meeting certain conditions. Where a person seeks to take advantage of the government's deregulatory relaxation he cannot benefit from the reduction under paragraph 9 as the correction will not meet the conditions in paragraph 9(1). This effectively means that it will be dangerous for a taxpayer to correct an error on a subsequent tax return unless he also makes a separate disclosure of the inaccuracy to HMRC, as a taxpayer has no way of knowing at the time when he discovers an error whether HMRC might consider that the error is one that arises due to failure to take reasonable care. The effect is that the government's deregulatory intention in increasing the de minimis limit will actually impose a greater rather than a lesser burden on business as the business will have to make two notifications instead of one. It is unlikely that the government intended this deregulatory measure as a trap to deny taxpayers the benefit of paragraph 9. The proposed amendment gives the taxpayer the benefit of paragraph 9 provided that he meets the appropriate conditions in response to a later request for information by HMRC.

Proposed amendment:

Page 394:

Line 16, add at end
(A2) For this purpose a person shall be deemed to have disclosed an inaccuracy if he corrects the inaccuracy in accordance with Regulation 34(3) of the VAT Regulations 1995 provided that if requested to do so he subsequently gave HMRC the help and access referred to in sub-paragraph 1".

4. Clause 118 and Schedule 41, Penalties for failure to notify etc

General comments

Again these provisions arise out of the Powers review and provide a comprehensive framework of penalties for failures to notify. These follow a similar format to those in Schedule 24 FA 2007 referred to above and provide for stepped penalties based on the level of tax lost and the taxpayer's behaviour. Penalties range from 100% of the tax lost for deliberate or concealed failure to 30% for non-deliberate and non-concealed failures with further reductions depending upon whether the taxpayer made a prompted or unprompted disclosure about the failure.

We do not think that these proposals will encourage a situation in which the deliberate non-complier can become compliant.

We are concerned that the stepped percentages are too high and are therefore unlikely to encourage people to come out of the 'shadow economy' and regularise their tax position. Paying the tax plus interest plus a penalty may be just too much for some taxpayers who would otherwise come forward.

In order to encourage non-compliant taxpayers to come forward and put their tax affairs in order, we recommend that there should be a system of suspended penalties similar to the regime which has been included in Sch 24, FA 2007. These provisions allow for a penalty to be suspended for up to two years subject to the taxpayer complying with any conditions. This system looks equally applicable to non-deliberate failure to notify cases and would allow HMRC to monitor future behaviour, such as whether the taxpayer submits returns on time and otherwise complies with his or her obligations, after the notification has been dealt with.

Proposed amendment

Page 406:

Line 11, add at the end

"16A (1) HMRC may suspend all or part of a penalty other than one for a deliberate act by notice in writing to P.

(2) A notice must specify –
(a) what part of the penalty is to be suspended,
(b) a period of suspension not exceeding two years, and
(c) conditions of suspension to be complied with by P.

(3) HMRC may suspend all or part of a penalty if it appears to them reasonable to do so or if compliance with a condition of suspension would be likely to encourage P to comply with his tax obligations in relation to periods after the notification of the penalty.

(4) A condition of suspension may specify –
(a) action to be taken, and
(b) a period within which it must be taken.

(5) On the expiry of the period of suspension –
(a) if P satisfies HMRC that the conditions of suspension have been complied with, the suspended penalty or part is cancelled, and
(b) otherwise, the suspended penalty or part becomes payable.

(6) *If, during the period of suspension of all or part of a penalty under paragraph 1, P becomes liable for another penalty under that paragraph, the suspended penalty or part becomes payable."*

Detailed comments on Schedule 41

Para 17
We think that the taxpayer should have a right of appeal against any penalty notice issued under para 16 rather than against any decision of HMRC to issue a penalty notice. Alternatively, the time limit for an appeal should run from the date of the receipt of the notice. The legislation clearly envisages that the decision should precede the notice, but does not limit the time that can elapse between the two. Accordingly it is possible for the time limit for the appeal to have expired before the taxpayer has even received the notice of the penalty.

Proposed amendment:

Page 406:

Line 13, leave out "a decision of HMRC" and insert "a notice under sub-paragraph 1(b) of paragraph 16".

Line 14, leave out "a decision of HMRC" and insert "a notice under sub-paragraph 1(b) of paragraph 16".

5. Clauses 122 to 124 and Schedules 42 and 43, Taking control of goods etc

General comments
Again these provisions arise out of the Powers review and provide for an officer of HMRC to make a single action (clause 122 relates to England and Wales and clause 123 to Scotland) to seize goods to recover a tax debt.

We are concerned that the provision in clause 122 refers to procedures in Schedule 12 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). Schedule 12 sets out procedures and powers for taking control of goods but these rules are subject to a number of areas where the precise procedures and powers are subject to regulations, for example:

- what goods can be taken (see below);
- what form of notice must be given to the debtor;
- the time when control of goods can be taken; and
- what powers of entry and force may be used.

As far as we are aware, none of these regulations has yet been published, thus making it impossible to determine whether these provisions are reasonable and appropriate in the circumstances.

We still have the concerns set out in TAXREP 22/08 submitted on 11 March 2008 to HMRC (see http://www.icaew.com/index.cfm?route=155211). In particular, we do not yet know what protections the taxpayer will have. Schedule 12 provides for goods to be taken unless they are exempt, and the exemptions are to be specified by regulation. At the moment HMRC follows a practice of not distraining on certain goods, such as those which are jointly owned or which are essential tools of the taxpayer's trade, but we do not know if this will continue under the new rules.

It is wholly unsatisfactory that such an important provision is introduced with such an unclear framework for enforcement. It is essential that the regulations under the TCEA 2007 are laid before these clauses are debated in Parliament so as to allow Parliament the opportunity for proper scrutiny of these provisions.

We also think it important that a taxpayer should be able easily to understand his rights and relegating safeguards and detailed provisions to secondary legislation will make it difficult for a person to do so. We strongly believe that if statutory powers are to be subject to limits or conditions, then these safeguards should also be spelled out in statute.

Detailed comments

We should like reassurances that the existing safeguards for the taxpayers which HMRC observes in distraint proceedings will be preserved. Section 61(4), TMA 1970 requires HMRC to keep the goods seized for five days before selling them. This should be preserved in any new rules. Para 39 of Sch 12 TCEA 2007 provides for a minimum period, to be specified by regulation – and again we do not know what that will be.

Under the present legislation, HMRC has power to distrain, but cannot insist on entry to premises in order to distrain goods unless it obtains a court warrant (s 61(2) TMA 1970). Under para 14, Sch 12, TCE 2007, an enforcement agent 'may' enter relevant premises without a warrant. This appears to give HMRC wider powers than at present. We think that the current requirement to obtain a warrant before insisting on entry should be preserved.

Proposed amendment:

Page 76:

Line 13, insert at end "except to the extent that the Regulations made under that Schedule –

(a) provide for a minimum period of less than five days, and
(b) paragraph 14 of that Schedule shall not apply

In TAXREP 22/08 we also expressed concern at the proposal (clause 122(1)) to extend HMRC's right to proceed against goods to amounts due under a contract settlement. We do not believe that the powers that are appropriate to the collection of tax should extend to civil debts that happen to be due to HMRC. A contract settlement is a civil agreement to accept a sum of money in lieu of tax. It is deliberately framed by HMRC as a civil contract. Accordingly HMRC should use the normal enforcement powers that relate to civil contracts to enforce such debts.

6. Clauses 125 and 126, Set off

General comments

These provisions also arise out of the Powers review and provide a statutory basis to allow HMRC to set-off sums payable to the taxpayer against sums owed to HMRC by the same taxpayer.

We are concerned that the use of a right of set off can be very damaging to a business and in some circumstances could force it into insolvency. It can equally be damaging to individuals and could cause extreme financial hardship. It is clearly difficult to try to define the circumstances in which the right ought not to be used. We feel however that HMRC should be required to publish a Code of Conduct setting out the circumstances in which they will and will not exercise a set off and that such a Code should be exposed in draft for public comment before it is brought into effect and before HMRC seek to use the right of set off.

We are concerned that clause 125(2) only allows the Commissioners to apply set-off and not the taxpayer. The right to claim set-off ought in equity to be available to both parties.

The provision needs to be amended to provide adequate safeguards to taxpayers. Currently, they are inadequate because:

i) Set-off should not be used for liabilities which are the subject of a formal complaint which is being investigated.

Proposed amendment:

Page 78:

Line 15, add at the end "and which is not the subject of an appeal or of a complaint".

ii) The order of set-off may make a considerable difference to taxpayers in terms of interest, surcharges, etc. The legislation should be amended to ensure that HMRC should be required to set-off debits and credits in whatever way is most favourable for the taxpayer.

iii) We understand that tax credits will not be used to reduce a tax debt. However, this is not stated specifically stated in the legislation. We also believe that tax credit overpayments should be excluded from any set-off.

iv) We assume that child benefit will also be excluded from set-off but again think that this needs to be set out in statute.

Proposed amendment:

Line 36, after "subject to" insert "paragraphs (2A) and (2B) below and"
Line 36, insert at the end

"(2A) Except with the agreement of the person concerned the Commissioners shall not set-off a credit in respect of tax credits or of child benefit against any debit.

(2B) Where the Commissioners could set-off a credit against two or more debits they shall do so in such manner as is most favourable to the person concerned".

v) We are concerned that by specifically excluding from set off in clause 126(2) post-insolvency credits against pre-insolvency debits, the rules are implicitly (or perhaps even explicitly) allowing the set off of pre-insolvency credits against post-insolvency debits. While this may not be particularly important in many corporate insolvencies there will be many cases (and all cases of personal insolvency) where such a set-off would be detrimental to the creditors generally and fly in the face of all the basic principles of insolvency.

Proposed amendment:

Page 78:

Line 31, leave out "that" and insert "a"

Line 31, at end insert "or a post-insolvency debit against a pre-insolvency credit".

7. Clause 132 and Schedule 44, Certificates of debt

General comments

As far as we are aware this is a clause that has not hitherto been exposed for comment although the Explanatory Notes say it has been subject to consultation. It adds a new section to the CRCA 2005 and is concerned with certificates of debt, which are what HMRC need before they can commence civil recovery procedures for tax debts.

Detailed comments

It should be made clear in the legislation that the certificate is not intended to be conclusive evidence but is rebuttable.

Proposed amendment:

Page 83:

Line 36, add at the end "in the absence of evidence to the contrary".

Amounts due under contract settlements are specifically included. In our TAXREP 22/08 (see http://www.icaew.com/index.cfm?route=155211) we said:

> *'We are also concerned at the proposal … to extend HMRC's right to proceed against goods to amounts due under a contract settlement. There is no such right under current law and HMRC has not indicated why it believes that powers which apply to tax should be extended to purely civil debts. We believe that HMRC ought to rely on contract law to enforce contracts in the same way as other parties to a contract. We also believe that the definition of a contract settlement could give rise to arguments. For example, a taxpayer sometimes includes in an offer liabilities that are out of time for assessment and we doubt that such an amount can be said to be 'in connection with any person's liabilities'. An offer is also sometimes made as a pragmatic way to resolve a dispute albeit that the taxpayer does not believe that any tax is due. We also doubt that such an offer is in connection with a liability. We do not think that taking goods is an appropriate remedy where there is a possibility of a dispute.'*

Proposed amendment:

Line 38, leave out "or under a contract settlement (within the meaning of section 25)".

There is doubt as to whether certificates apply to tax credits and we would welcome clarification of the position.

Further information

Please do contact the ICAEW if you require any further information:

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